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Open Records Decision No. 426

Re: Whether computer programs, formulas or other methodologies used by an appraisal district to determine the value of multi-family dwellings is available to the public

Dear Mr. Wall:

The president of the Houston Apartment Association has asked the Harris County Appraisal District to provide it with the following information:

1. Any and all policies, procedures, computer programs, formulas or other methodologies used by the Harris County Appraisal District to determine the value of multi-family dwellings within the district. Such items are requested whether they be written, on magnetic tape or disc, or in any other form.

2. Any and all data, studies, sales records or other material used by the appraisal district to determine the value of multi-family dwellings whether such material is used as comparable data on a case-by-case basis for the development of any policy, procedure, computer program, formula or other methodology to determine said value. Such data shall be all that is in the records of the district including, but not limited to, the following:

- a. Sales prices of any comparables;
- b. Terms of payment for any such sale price including interest rate and timing on any deferred payments;
- c. Date of any sales;
- d. Other agreements (including but not limited to syndication fees, guaranteed income, leasebacks and other payments or fees).

As attorneys representing the Harris County Appraisal District, you assert that the "computer programs, formulas or other methodologies used by the appraisal district to determine the value of multi-family dwellings within the district" constitute "trade secrets" of Cole-Layer-Trumble, the company with which the district contracted for data processing services, and are therefore protected from required disclosure by section 3(a)(10) of the Open Records Act, article 6252-17a, V.T.C.S., which excepts

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

We understand that the availability of the remainder of the material requested in this instance is not at issue here and assume that the district has voluntarily released it. Consequently, we deal only with the availability of the "computer programs, formulas or other methodologies" used by the district.

Although a trade secret may consist of a compilation of information, Hyde Corporation v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958), "trade secret" ordinarily refers to the particular manner in which the information is compiled and usually deals with a pattern, formula, or device. See, e.g., Hallmark Personnel of Texas, Inc. v. Franks, 562 S.W.2d 933 (Tex. Civ. App. - Houston [1st Dist.] 1978, no writ). For example, the owner of the "trade secret" in the Hallmark Personnel case did not claim that the data contained on an employment agency's applicants' cards was itself a trade secret; rather, the trade secret owner would have to show that the actual details of how the data was analyzed constituted a trade secret because these "actual details" would make the information valuable to a competitor. Id. at 935. Customer lists which have been kept carefully guarded are often protected, see Crouch v. Swing Machinery Company, Inc., 468 S.W.2d 604, 605-07, (Tex. Civ. App. - San Antonio 1971, no writ), but matters of general knowledge are not trade secrets and cannot be transformed into trade secrets merely by collecting information in a certain way. Reading & Bates Construction Company v. O'Donnell, 627 S.W.2d 239, 243 (Tex. App. - Corpus Christi 1982, writ ref'd n.r.e.). On the other hand, the fact that a "trade secret" may be discovered by fair means will not deprive the trade secret's owner of protection from one who obtains it by unfair means.

Prior Open Records Decisions establish that decisions as to whether information constitutes a "trade secret" are to be made by relying on the following six criteria:

- (1) the extent to which the information is known outside [the owner's] business; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy

of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757, comment b (1939). See, e.g., Open Records Decision Nos. 306 (1982); 255 (1980). In this instance, Cole-Layer-Trumble [hereinafter CLT] asserts that the computer programs meet the trade secrets criteria in the following ways:

1. The extent to which the information is known outside of the Cole-Layer-Trumble Company and clients: To our knowledge, none exists. No other commercial valuation system with near the sophistication of the CLT system is available. The income and expense modules are unique in the business.

2. The extent to which it is known by employees and clients of CLT: There are currently only four employees, two located in Houston and two in Dayton, Ohio, who have in-depth knowledge of the system. Only one is qualified to make extensive changes. Several other employees are capable of transferring the software but are not capable of making changes in the methodology. A number of clients (covered by non-disclosure agreements) are familiar with the overall logic but not the intricate details.

3. The extent of measures taken by CLT to guard the secrecy of the information: The commercial valuation system is not available without a contract with CLT. The agreement not to disclose software is a standard part of contracts signed by CLT. Programs are labeled with copyright statements. The source code is not accessible to persons without a password. The location of the system is not general knowledge. Program changes are made only by programmers with the permission of the project management.

4. The value of the software to CLT and CLT's competitors: There is a widespread demand for a commercial appraisal system in the mass appraisal business. The system allows the knowledge and experience of very competent and experienced appraisers to be applied by less experienced appraisers. There is no other computerized

commercial appraisal system like the CLT system available. No other system is as detailed in the application of the cost approach. No other system providing full income and expense calculations has been developed. The system not only sells itself but also sells entire appraisal projects based upon its inclusion in the package. If competitors possessed the system, they would become able to market both the commercial appraisal system and entire appraisal projects utilizing the system. There is also a market for the system among fee appraisers who must now use manual appraisal methods for commercial properties.

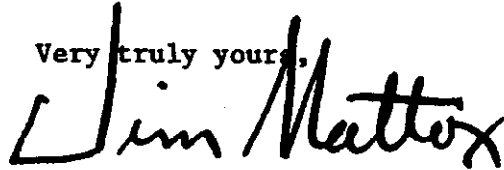
5. The amount of effort or money CLT has expended in developing the software: The current software includes over ten years of effort in direct development costs. The experience of appraising over 100,000 commercial properties has contributed further enhancements. The direct effort involved three system analysts with over five years experience each and two commercial appraisers with over twenty years experience each. Numerous senior-level appraisers have contributed testing time and suggestions for improvement. Senior-level analysts with experience in the mass appraisal business have contributed to the interface with the total appraisal process. The effort has not only been large but also has involved a number of people with unique skills and experience in the mass appraisal business.

6. The ease or difficulty with which the software properly could be acquired or duplicated by others: The software can be purchased by clients willing to sign nondisclosure statements. It is normally sold as part of a larger package including appraisal work. The system is only sold, installed and tested on a client computer. Minimal cost, which includes other elements necessary to build and edit data files, is \$250,000 to \$300,000. Customized systems based upon the modules are more expensive. An equivalent design would require both appraisers and senior analysts with extensive mass appraisal experience. These are not readily available. Assuming the personnel was available, we estimate it would take at least \$500,000 to duplicate the modules. Several years of effort actually using the system in the field would be required to duplicate the finely-tuned points of the existing

modules. Tens of thousands of properties would have to be appraised manually and compared with the computer results.

The Harris County Appraisal District is in the best position to determine whether Cole-Layer-Trumble's arguments satisfy applicable requirements for classifying the requested documents as "trade secrets." As attorney for the district, you have endorsed the company's arguments. Because this office cannot resolve such questions of fact, we accept your endorsement. Based on these arguments, we conclude that the "trade secrets" criteria are satisfied in this instance. We therefore conclude that the requested information is protected from required disclosure under section 3(a)(10) of the Open Records Act.

Very truly yours,



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